

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

ORIGINAL

DOCKET FILE COPY ORIGINAL SEP - 8 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

CC Docket No. 94-129

DOCKET FILE COPY ORIGINAL

In The Matter of )  
)  
)

Policies and Rules Concerning )  
Unauthorized Changes of Consumers' )  
Long Distance Carriers )

COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION  
ON PETITIONS FOR RECONSIDERATION

The Telecommunications Resellers Association ("TRA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits its comments on the petitions for reconsideration filed in the above-referenced proceeding. In its Report and Order dated June 14, 1995, the Federal Communications Commission (the "Commission") adopted rules designed to curb the unauthorized switching of consumers' primary interexchange carriers, an activity more commonly known as "slamming." Those rules modified the procedure by which carriers must document consumer requests to change their primary interexchange carrier ("PIC"), the format for Letters of Agency ("LOAs"), including the physical characteristics of the LOA, the information which the Commission has determined must be provided in LOAs, and limitations on information which may be included. Along with the requirement to document conclusively consumer requests to change their long distance provider, the Commission also imposed upon carriers the obligation to reimburse the customer for any long distance toll charges incurred as a result of an unauthorized PIC change which exceeded the long distance toll charges the customer would have incurred had the unauthorized switch not taken place.

No. of Copies rec'd  
List ABCDE

024

Several parties have petitioned for reconsideration of the Commission's rules, including MCI Telecommunications Corporation ("MCI"), AT&T Corp. ("AT&T"), Sprint Communications Company ("Sprint"), Allnet Communication Services, Inc. ("Allnet"), Frontier Communications International, Inc. ("Frontier"), and the National Association of Attorneys General Telecommunications Subcommittee (the "Attorneys General"). TRA's comments will address only the petitions for reconsideration filed by the Attorneys General. Specifically, TRA opposes the Attorneys' General request that the Commission absolve consumers who claim to have been slammed of any obligation to pay for the long distance service they have received. While TRA applauds the efforts of the Attorneys General to safeguard the consuming public, it submits that in this instance the proposed safeguard would not be in the public interest because it would impose massive new burdens on Interexchange Carriers ("IXCs"), particularly the smaller resale carriers that comprise TRA, thereby impeding the ability of those resale carriers to provide high-quality service at affordable rates.<sup>1/</sup>

## I.

### INTRODUCTION

At the outset, the Commission should be commended for formulating slamming rules which strike a delicate, and TRA<sup>2/</sup> believes appropriate, balance between the complementary goals

---

<sup>1/</sup> TRA also takes exception to the Attorneys' General proposal to eliminate the ability of IXCs to utilize separable LOAs, a limitation which would constitute an onerous burden to many smaller carriers.

<sup>2/</sup> TRA was created to foster and promote the interests of entities engaged in the resale of domestic interexchange and international telecommunications services. Employing the transmission, and often the switching, capabilities of underlying facilities-based network

(continued...)

of eliminating slamming and supporting consumers' rights to enjoy a more fully competitive long distance market. TRA wholeheartedly supports the Commission's determination that, in order to ensure that any change of long distance carrier represents the informed decision and clear intention of the consumer, LOAs should convey clearly and understandably that by signing an LOA a consumer is changing his or her long distance carrier. TRA also applauds the Commission's decision that informed consumer choices will be encouraged by provision of a complete translation of an LOA whenever an IXC wishes to provide any LOA information in a language other than English. Additionally, the Commission's prohibition of "negative option" LOAs, which would require a consumer to take affirmative action to retain a previously selected

---

<sup>2</sup>(...continued)

providers, the resale carriers comprising TRA create "virtual networks" to serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to long distance rates otherwise available only to much larger users. TRA resale carrier members also offer small and mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally not provided to low volume users.

TRA's members -- more than 300 resale carriers and their underlying service and product suppliers -- range from emerging, high-growth companies to well-established, publicly-traded corporations. They represent the fastest growing sector of the long distance industry. Already populated by more than 1,000 carriers, the interexchange resale community currently serves millions of customers, representing tens of billions of minutes of long distance traffic, and generates annual revenues in the billions of dollars. And the market share of the interexchange resale industry is nonetheless forecast to double in size by the end of the century.

Most of TRA's resale carrier members are not yet a decade old. Their emergence and dramatic growth over the past five to ten years have produced thousands of new jobs and new opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based long distance providers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

long distance provider, is an appropriate means of guarding against unintended PIC changes. On these issues, the Commission has encountered nearly universal support.

Certain commentators, however, notably the Attorneys General, question the Commission's wisdom in enacting various other features of the slamming rules. For example, the Attorneys General fault the Commission for balancing the financial interests of customers whose long distance carrier has been changed without their consent against the risk of stifling the ability of legitimate long distance providers to deliver competitive offerings to the public. In particular, the Attorneys General object to the Commission's ruling that consumers who have been slammed must only be made whole -- i.e., reimbursed for the difference between toll charges incurred and the toll charges which would have been incurred had slamming not taken place -- rather than awarded a "windfall" in the form of months of free long distance service.

The Attorneys General also dispute the Commission's recognition of the continued viability (and frequently the marketing necessity) of attaching a separable LOA, with its clear and unmistakable purpose of allowing a consumer to effect a change in his or her long distance carrier, to marketing materials.

While the Attorneys' General arguments against retention of the balanced rules adopted by the Commission are motivated by a strong desire to protect the public interest, those concerns, addressed below, underestimate both the severity and available range of sanctions that may be levied by the Commission against slammers and the burden on legitimate carriers occasioned by the safeguards proposed by the Attorneys General. Moreover, the Attorneys' General examination of "long established principles of equity" fails to consider other equally compelling equitable principles which should be considered to avoid creating a regulatory

environment that potentially fosters precisely the dangers the Commission so judiciously sought to avoid -- unjust enrichment and encouragement of unfounded and unjustified slamming complaints. Furthermore, the blanket prohibition against the use of "separable" LOAs advocated by the Attorneys General will unnecessarily hinder legitimate marketing efforts, thereby dampening competition with no appreciable countervailing gain in the area of consumer protection.

## **II.**

### **ARGUMENT**

#### **A. Retention of Consumer Liability.**

In formulating its rules, the Commission was faced with the daunting task of simultaneously promoting various and complex policy goals including: (i) protecting the consuming public from financial detriment, (ii) deterring the offensive practice of slamming, and (iii) ensuring the continued ability of legitimate long distance carriers to provide competitive choices to consumers in a long distance industry which has traditionally been pervaded by overwhelmingly monopolistic behavior. Although progress toward any one of these goals conceivably could lead to an encroachment of the protections afforded by the others, the Commission's rules have blended these apparently divergent objectives to achieve a symmetry which supports all policy considerations to the detriment of none.

The Commission addressed the need to protect consumers from economic harm by adopting the policy that consumers who have been slammed must be "made whole" by an IXC that is unable to document clearly that the consumer sought to be switched. TRA fully agrees that consumers should be made whole, that is, that no consumer should suffer financial harm in

the form of long distance toll charges which exceed the rates which the consumer has previously indicated a willingness to pay. While recognizing that requiring IXCs to refund excess toll charges may not be "the best deterrent against slamming," the Commission weighed the deterrent effect of requiring such refunds against the more grave potential consequences which could arise from a policy totally absolving the consumer from liability for months of long distance service actually used by the consumer and arrived at the reasoned conclusion that "the equities tend to favor the 'make whole' remedy." Report and Order, FCC Docket No. 94-129, FCC Document No. 95-225 (released June 14, 1995) at 20.

TRA, along with virtually every commentor, agrees that consumers should be made whole and strongly urges the Commission to retain the "made whole" policy rather than risk opening a Pandora's Box of toll fraud evils. As pointed out by Sprint, "a rule that an asserted unauthorized carrier should receive no compensation at all would clearly encourage toll fraud." Reply Comments of Sprint Communications Company ("Sprint Reply") at 7. By repeatedly, intentionally switching long distance carriers without returning executed LOAs, consumers could incur significant legitimate toll charges and later claim to have been "slammed" to escape liability for those charges. Sprint Reply at 7. The absolute elimination of consumer liability for toll charges incurred thus presents a monumental opportunity for unscrupulous consumers to gain a windfall in the form of free long distance service -- a windfall which would ultimately represent high long distance toll charges to all consumers.

Further, as pointed out by TRA and others, one member of a household frequently initiates a PIC change on behalf of the household. In this situation, even an IXC who can document a PIC change by a consumer may find itself unable to collect legitimate toll charges

in the event a fraudulent slamming claim is raised. Because administrative costs would negate any real possibility that IXC's could successfully defend numerous unfounded slamming claims, the Commission's decision to preclude the potential for a customer windfall by limiting refunds to the difference between the toll charges billed and the toll charges which would have been billed, while clearly exposing the IXC's to potentially significant financial risk, at least preserves the possibility that fraudulent slamming claims will not drive IXC's out of business.

The Commission, the consuming public, and all participants in the long distance industry support the elimination of slamming. In arguing that the "made whole" policy will not sufficiently deter slamming activities, the Attorneys General focus on only part of the Commission's efforts to deter slamming. In addition to the measures specifically adopted under the slamming rules, the Commission has also recently implemented a policy of fining companies engaged in slamming activities. As evidence of the Commission's commitment to the elimination of slamming, the FCC has issued Notices of Apparent Liability holding two IXC's liable for forfeiture penalties for willfully violating the slamming rules. Citing the "apparently willful or repeated nature of the violations," the Commission's Enforcement Bureau assessed forfeiture penalties in the amount of \$40,000 and \$80,000 against the companies, relatively high amounts for initial penalties. Moreover, in March of this year, the Commission issued a Notice of Apparent Liability for Forfeiture as a result of slamming activities in the amount of One Million Four Hundred Ten Thousand Dollars (\$1,410,000).<sup>3/</sup>

---

<sup>3/</sup> FCC Notice of Apparent Liability for Forfeiture, File No. ENF-95-04, released March 31, 1995 (finding Oncor Communications, Inc., liable for forfeiture for willful and repeated violation of Commission rules and orders by changing primary interexchange carrier without authorization).

The final policy goal supported by the slamming rules as currently formulated is the Commission's unwavering commitment to the development and preservation of a competitive long distance market. As previously noted by TRA in its Comments, the long distance arena continues to be dominated by a single carrier; that carrier and two others account for more than 85 percent of customer revenues. The presence in that market of smaller resale carriers, such as many members of TRA, provides the consuming public with a limited (though increasing) measure of competitive choices for obtaining long distance service. The Commission's rules have established a mechanism which should go far toward alleviating the practice of slamming. By supporting the total elimination of customer liability for toll charges, the Attorneys General seek a substantial and drastic revision of the Commission's rules. They propose, in effect, the imposition of potentially massive costs to IXCs -- costs which would undoubtedly result only in marginally reduced slamming activity. Such a sweeping modification of the rules as that proposed by the Attorneys General would inevitably and tremendously burden all IXCs, a burden that would be disproportionately borne by those small- to medium-sized carriers who are already waging a daily battle against the long distance industry's myriad and firmly entrenched vestiges of monopolistic practices. Any marginal decrease in slamming would therefore be purchased only through the exorbitant price of severe reduction -- or elimination -- of nascent competition in the long distance market.

TRA urges the Commission that continued vigilance in the form of requiring IXCs who have engaged in slamming to refund excess toll charges, along with the threat of slamming fines for violating companies, will significantly deter slamming activities without placing the vitality of competitive long distance providers at risk. If the Commission later determines to



revisit the issues, any appropriate modification of the rules can be accommodated at that time. Indeed, in its Report and Order, the Commission specifically committed to "investigate future slamming cases with the question of consumer liability in mind." Report and Order at 20.

**B. Continued Viability of Separable LOAs.**

In determining that IXCs may continue to utilize separable LOAs, the Commission has once again recognized and supported two beneficial ideals, namely preventing practices that could potentially mislead or confuse the consuming public, and refraining from hindering the legitimate marketing concerns of service providers to avoid damaging the competitive spirit of the industry.

The Commission has provided clear guidance regarding minimal information which must be contained in an LOA, including an indication by the subscriber that the subscriber desires to change his or her long distance carrier from the current interexchange carrier to the prospective carrier, as well as a statement that the subscriber understands that a charge may be assessed against the subscriber for changing long distance carriers. In other words, the LOA actually signed by the consumer must clearly convey to that consumer that, by executing the LOA, the consumer is authorizing a PIC change.

Having thus provided for the provision of clear, unambiguous language to the consumer, the Commission went on to recognize, during its consideration of public interest concerns that might flow from requiring physically separate LOAs, that "it is the smaller carriers that will be most impacted by the required separation, for such carriers do not have available to them the alternatives of massive advertising campaigns on radio and nationwide television."

Report and Order at 15. Accordingly, and consistent with its long-standing policy of fostering competition within the long distance industry, the Commission declined to adopt a requirement that LOAs must be physically separate from other materials. In light of the fragility of the industry's competitive nature, discussed above, TRA ardently supports the Commission's holding that separable LOAs may continue to be used by IXCs.


### III.

#### CONCLUSION

By reason of the foregoing, TRA endorses portions of the Attorneys' General Petition for Reconsideration and urges the Commission to retain customer liability for toll charges to the extent of the charges which would have been incurred if the consumer had not been slammed and to maintain in effect the IXCs' ability to utilize separable LOAs, consistent with the foregoing comments.

Respectfully submitted,

**TELECOMMUNICATIONS RESELLERS  
ASSOCIATION**

By: 

Charles C. Hunter  
Kevin S. DiLallo  
Hunter & Mow, P.C.  
1620 I Street, N.W.  
Suite 701  
Washington, D.C. 20006

September 8, 1995

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 1995, copies of the foregoing Comments of the Telecommunications Resellers Association on Petitions for Reconsideration were mailed by first-class mail, postage prepaid, to the following:

Neil G. Fishman  
Assistant Attorney General  
State of Connecticut  
Chairperson  
Telecommunications Subcommittee  
Consumer Protection Committee  
National Association of Attorneys General  
MacKenzie Hall, 10 Sherman Street  
Hartford, CT 06105-2294

Roy L. Morris  
Allnet Communications Service, Inc.  
1990 M Street, N.W.  
Suite 500  
Washington, D.C. 20035

Richard Blumenthal  
Attorney General  
State of Connecticut  
55 Elm Street  
7th Floor  
Hartford, CT 06106

Michael J. Shortley, III  
Frontier Communications  
180 South Clinton Avenue  
Rochester, NY 14646

Leon M. Kestenbaum  
H. Richard Juhnke  
Sprint Communications  
1850 M Street, N.W.  
11th Floor  
Washington, D.C. 20036

Mark C. Rosenblum  
Robert J. McKee  
Peter H. Jacoby  
Seth S. Gross  
AT&T Corporation  
Room 3244J1  
295 North Maple Avenue  
Basking Ridge, NJ 07920

Gregory Intoccia  
Donald J. Elardo  
MCI Telecommunications Corporation  
1801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

  
Catherine M. Hannan